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In the Supreme Court of the United States

OCTOBER TERM, 1979

LANE PROCESSING, INC., PETITIONER

v.

RAY MARSHALL, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

CARIN ANN CLAUSS
Solicitor of Labor

DONALD S. SHIRE
Associate Solicitor

LOIS G. WILLIAMS
Deputy Associate Solicitor

KERRY L. ADAMS
CLAIRE B. WHITE
Attorneys
Department of Labor
Washington, D.C. 20210

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OPINIONS BELOW

The opinion of the court of appeals (Pet. Supp. App.) is reported at 606 F. 2d 518. The opinion of the district court (Pet. App. 3a-12a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on January 4, 1980. The petition for a writ of certiorari was filed on April 3, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the court of appeals correctly held that an injunction should issue to prohibit petitioner from committing further violations of the child labor provisions of the Fair Labor Standards Act.

STATEMENT

The child labor provisions of the Fair Labor Standards Act (Sections 12(c) and 15(a)(4), 29 U.S.C. 212(c) and 215(a)(4)) prohibit the employment of minors under the age of 16.[1] In June 1976, the Secretary of Labor brought this action in the United States District Court for the Western District of Arkansas to enjoin petitioner, under Section 17 of the Act, 29 U.S.C. 217, from employing underage minors at its chicken processing plants in Grannis, Arkansas, and Broken Bow, Oklahoma.

The Secretary's evidence established a long history of child labor violations at petitioner's two plants (Pet. Supp. App. 2-3). Over a period of eight years, five separate Labor Department investigations at Grannis and four at Broken Bow disclosed that petitioner illegally employed over 200 minors under the age of 16. At various points during these investigations, the Department expressly identified as many as 50 illegally employed children and warned petitioner about the violations. Although each time petitioner promised future compliance, subsequent investigations revealed that petitioner continued to employ some of the identified children and had hired several more. The final investigations disclosed that 23 underage minors were illegally employed at the Broken Bow plant, eight of whom had been identified during a previous investigation, and that two underage minors had been employed at the Grannis plant since the last investigation (*ibid.*). Although petitioner was in compliance with the Fair Labor Standards Act at the time of trial, it had illegally employed 15 children subsequent to the filing of the complaint (*id.* at 4).

[1]Sections 12(c) and 15(a)(4) prohibit the employment of "oppressive child labor," which is defined to include "a condition of employment under which * * * any employee under the age of sixteen years is employed by an employer * * * in any occupation * * *." Section 3(*l*), 29 U.S.C. 203(*l*). Pursuant to authority granted in the same definitional section, the Secretary of Labor has determined that minors between the ages of 14 and 16 may be employed under prescribed conditions in certain occupations, but processing occupations are not among them. See 29 C.F.R. 570.33(a).

Petitioner admitted these recurring violations (Pet. App. 4a), but argued against an injunction on the ground that the violations had ceased and were not likely to recur (*id.* at 5a). The district court refused to enjoin future violations, reasoning that an injunction would damage petitioner's "public image" and could cause financial hardship by hindering petitioner's ability to obtain loans (*id.* at 11a).

The court of appeals reversed. Following its earlier decision in *Brennan* v. *Correa*, 513 F. 2d 161 (1975), it held that in determining whether to enjoin an employer from future violations of the Act, a district court "must exercise its discretion to accomplish the Act's objective of abolishing oppressive child labor" (Pet. Supp. App. 3-4) and must consider the employer's history of past violations to determine whether it is reasonably probable that such violations will recur. Here, the court of appeals said, "[t]he record speaks for itself. [Petitioner] has manifested a total indifference to compliance with the Act. Under the circumstances, [it was] an abuse of discretion for the district court to have failed to issue an injunction" (*id.* at 4-5). The court of appeals dismissed the district court's concerns for petitioner's public image and possible financial hardship as irrelevant to a determination of whether injunctive relief should issue, since neither factor bears on the necessity of an injunction to carry out the Act's objectives.

ARGUMENT

Petitioner contends (Pet. 5-8) that the court of appeals erred in ordering issuance of an injunction because, by the

time of trial, petitioner had adopted a "sophisticated" compliance system to halt future child labor violations. This putative factor, which the district court did not specifically mention as a reason for denying an injunction, is not determinative.

The court of appeals correctly held that even where the employer is in compliance at the time of trial, "an injunction should issue unless the court can be soundly convinced that there is no reasonable probability of a reoccurrence of the acts" so as to effectuate Congress' intent to eliminate oppressive child labor (Pet. Supp. App. 4). It is not the current method an employer uses to eliminate violations that must guide the court, but rather "the employer's previous noncompliance and the dependability of its promise of future compliance" (*Brennan* v. *Correa, supra*, 513 F. 2d at 163 (citations omitted)). In the instant case, there were repeated flagrant violations, both before and after the filing of the complaint, despite petitioner's repeated assurances of future compliance (Pet. Supp. App. 2-3). The court of appeals was clearly correct in concluding, based on the discrete facts of this case, that as to petitioner "compliance comes about only through legal compulsion" (*id.* at 4), and in holding that an injunction was necessary.

Contrary to petitioner's assertion (Pet. 6-7), this result follows from, rather than conflicts with, the court of appeals' own prior rulings. Under each of the varying fact situations in the cases cited by petitioner there was, as here, inadequate assurance of future compliance. In each instance, an injunction was warranted because the employer had failed to secure compliance after warnings by the Department of Labor. See *Brennan* v. *Correa, supra; Goldberg* v. *Kickapoo Prairie Broadcasting Co.*, 288 F. 2d 778 (1961); *Tobin* v. *Anthony-Williams Mfg.*

Co., 196 F. 2d 547 (1952); *Lenroot* v. *Interstate Bakeries Corp.*, 146 F. 2d 325 (1945).

Nor does the decision below conflict with *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419 (1945). In that case, the Secretary unsuccessfully sought to enjoin the use of a method of piece rate compensation incorporated in an employer-employee wage agreement. This Court held that the district court did not abuse its discretion in declining to issue an injunction since the employer had abandoned the disputed wage practice and had entered into a new wage agreement with its employees. Because of the new agreement, there was little likelihood that the employer would resume its earlier practice. In contrast, here there is nothing to ensure that petitioner will not resume its established pattern of using unlawful child labor.

Finally, the decision below is in accord with rulings on this issue in other circuits. Injunctions have issued whenever an employer persists in violating the Act after the Department has issued warnings, even if there is compliance at the time of trial and the employer promises compliance in the future. See *Brennan* v. *Peterson*, 22 Wage and Hour Cas. 294 (10th Cir. 1975); *Brennan* v. *S & M Enterprises*, 505 F. 2d 475 (D.C. Cir. 1974); *Hodgson* v. *Bradley*, 474 F. 2d 1341 (4th Cir. 1973) (table); *Shultz* v. *Salinas*, 416 F. 2d 412 (5th Cir. 1969); *Beneficial Finance Co.* v. *Wirtz*, 346 F. 2d 340 (7th Cir. 1965). In each of these cases the court examined the history of the employer's practices and ordered or sustained an injunction against future violations because the employer had demonstrated a proclivity for unlawful conduct. As the Fourth Circuit said in an analogous situation, "[u]nderstandably, the Secretary has had enough of [the employer's] promises. If [the employer] really intends to

comply with the Act, its future business conduct will in no way be inhibited by an injunction" which, after all, merely requires the employer to obey the law. *Hodgson* v. *Approved Personnel Service, Inc.*, 529 F. 2d 760, 764 (1975) (Age Discrimination in Employment Act of 1967).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

CARIN ANN CLAUSS
Solicitor of Labor

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Deputy Associate Solicitor

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